

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PAUL W. ROBERTS**  
Claimant

VS.

**USD 259**  
Self-Insured Respondent

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Docket No. 1,049,901

**ORDER**

Respondent appealed the January 13, 2012, Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on April 20, 2012, in Wichita, Kansas.

**APPEARANCES**

Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board the parties stipulated claimant had a 7% permanent functional impairment to the right lower leg.

**ISSUES**

This is a claim for a May 12, 2008, accidental injury. In the January 13, 2012, Award, ALJ Barnes awarded claimant permanent partial disability benefits based upon a 7% functional impairment to his right lower leg, a 34% functional impairment to his left leg, and a 7.5% whole body functional impairment for his low back.

Respondent contends that claimant's award of permanent disability benefits should be limited to that for his lower extremity functional impairments. Respondent asserts claimant is not entitled to an award for his back as it maintains all of the functional impairment with regard to his back was preexisting. Respondent maintains claimant

sustained a 7% functional impairment to the right lower leg and a 28% functional impairment to the left leg.

Claimant asks the Board to affirm the ALJ. He asks the Board to average the permanent impairments to the lower extremities of Drs. Fluter and Stein and find claimant sustained permanent impairments of 34% to the left leg and 7% to the right lower leg. Claimant asserts he developed low back problems, which he attributed to an altered gait. He indicated that he was listing or tilting to one side because of back difficulties in 2006 or 2007.<sup>1</sup> He asks that the 10% permanent impairment of the lumbar spine provided by Dr. Fluter be averaged with the 5% permanent impairments given by Drs. Barrett and Stein for a whole body permanent impairment of 7.5%.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's permanent functional impairment of the left leg?
2. What, if any, is the nature and extent of claimant's permanent functional impairment to the low back?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Respondent admitted that claimant met with personal injury by accident on May 12, 2008, arising out of and in the course of his employment. On the date of the accident claimant fell off a stepladder when it was struck by a gust of wind and broke both his ankles. Claimant landed on his heels and fell onto his left side. He could not get up and was taken by ambulance to Wesley Medical Center.

Prior to the accident, claimant worked for respondent for approximately 20 years as a painter. In January 2006, while building scaffolding and painting at work, claimant sustained a low back injury. Dr. Gregory Lakin initially provided treatment for claimant's low back. Claimant underwent an MRI on March 14, 2006, which indicted a very large posterior left paramedian disc extrusion at L4-5 with significant effacement of the left L5 nerve root and anterolateral thecal sac on the left at that level and significant neuroforaminal narrowing on the left. The MRI also showed a moderate to large posterior central disc protrusion at L5-S1 with effacement of the anterior thecal sac at that level.

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<sup>1</sup> R.H. Trans. at 32-33.

Claimant was referred to Dr. John P. Estivo, an orthopedic specialist, who saw claimant on March 22, 2006. He reviewed the MRI and also ordered x-rays of claimant's low back. His impression was that claimant had herniated discs and degenerative disc disease at L4-5 and L5-S1. Dr. Estivo indicated claimant had a slight list. At Dr. Estivo's recommendation, claimant received physical therapy and epidural injections. Dr. Estivo indicated claimant reached MMI on May 22, 2006. His note from that visit stated, "The patient is doing extremely well at this time. He is completely asymptomatic. He is at maximum medical improvement. He has not incurred any impairment. He does not require any formal restrictions for the future."<sup>2</sup> Claimant returned to his normal work duties with no restrictions.

Claimant suffered another back injury while moving furniture at work in October 2007 and again was treated by Dr. Estivo. On October 29, 2007, Dr. Estivo's impressions were lumbar radiculopathy with a history of herniated discs at L4-5 and L5-S1, and he ordered x-rays and an MRI. An October 30, 2007, MRI showed degenerative changes at L4-5 and L5-S1 with a protruding disc at L4-5 on the left and a protruding disc at L5-S1 on the right. After reviewing the MRI, Dr. Estivo's impressions were degenerative disc disease with herniated discs at L4-5 and L5-S1. Dr. Estivo prescribed physical therapy for claimant. On December 3, 2007, claimant was released to work without restrictions. He opined claimant had no impairment and was completely asymptomatic. Claimant acknowledged that he told Dr. Estivo of being pain free. Claimant again returned to his normal work duties with no restrictions.

Claimant testified that following the May 12, 2008, accident he had one surgery on his right lower extremity and three surgeries to his left lower extremity. The left ankle was initially treated by external fixation. On June 10, 2008, Drs. Michelle Klaumann and J. Stanley Jones performed an open reduction and internal fixation on the right ankle. On August 19, 2008, Drs. Klaumann and Jones performed a left tibiotalar calcaneal arthrodesis with intramedullary nail and removal of left lower extremity external fixator (left ankle fusion). Claimant returned to work on October 24, 2008, but was on crutches for three months. From May 2008 through March 2009, claimant used crutches or a cane. In July 2009, Dr. Naomi Shields surgically fused claimant's left 2nd toe. Following the toe fusion claimant missed one week of work. Dr. Shields released claimant from her care in November 2009.

At respondent's request, claimant was examined by Dr. Anthony G. A. Pollock, an orthopedic physician, on December 28, 2009. In accordance with the *AMA Guides*,<sup>3</sup> the doctor gave claimant a 10% permanent impairment for the left lower extremity and a 12%

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<sup>2</sup> Stipulation to Medical Records (filed April 21, 2011).

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

permanent impairment to the right lower extremity. His report does not indicate claimant made any back complaints. However, he was employed by respondent only to evaluate claimant's lower extremities. In their briefs, both parties asked the Board to disregard Dr. Pollock's opinions. Respondent asserts Dr. Pollock's opinion is inaccurate as he found no evidence of atrophy in claimant's left leg. Claimant indicated Dr. Pollock not only missed the left leg atrophy, but claimant noted that Dr. Pollock's opinion was two years old and he missed claimant's left second toe impairment.

At the request of his attorney, claimant was seen on April 5, 2010, by Dr. George G. Fluter, a physical medicine and rehabilitation specialist. Before examining claimant, Dr. Fluter reviewed the medical records concerning claimant's lower extremity injuries. Dr. Fluter's report indicated claimant complained of pain in both lower extremities. Claimant reported having bulging and herniated discs from a previous low back injury five years earlier and a flare-up around September 2007. However, claimant had "no further sequelae since that time."<sup>4</sup> Claimant reported he would have back/left hip pain if he walked for prolonged periods of time. Dr. Fluter assessed claimant with several lower extremity conditions and low back/left hip pain.

Dr. Sandra Barrett, a physical medicine and rehabilitation specialist, saw claimant on June 24, 2010, for his complaints of low back pain. Her note from that visit indicates that claimant noticed an onset of low back and left hip pain around January 1, 2010. Claimant was uncertain if this was because of his compensated gait. She ordered x-rays and examined claimant. Dr. Barrett's impression was status post fall with lower extremity fractures with secondary low back pain. She believed the low back pain was likely secondary to the compensated gait from the lower extremity fractures. Dr. Barrett indicated her treating diagnosis was lumbar strain with left SI joint dysfunction and sacroiliitis.

Claimant was last seen by Dr. Barrett on October 7, 2010. Her impression was low back pain with disc disease. Dr. Barrett opined that using the *Guides*, claimant had a 5% permanent impairment of the lumbar spine. However, the 5% was attributed to disc disease that preexisted claimant's May 12, 2008, accident. She indicated claimant had a zero percent permanent impairment of the lumbar spine resulting from the accident on May 12, 2008. The following testimony of Dr. Barrett is notable:

Q. (Mr. Gurney) Can we agree that in December of 2007, after some treatment, that he had returned back to the same condition that we have just described in 2006, that being he was completely asymptomatic, there were no positive findings on exam, there was just nothing that would constitute a ratable condition under the guides [sic]?

A. (Dr. Barrett) Correct.

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<sup>4</sup> Fluter Depo., Ex. 2 at 1.

Q. So if we assume as true Mr. Roberts' status as of December 3, 2007 as reflected in Dr. Estivo's notes, he has zero impairment; true?

A. Correct.

Q. Do you have any notes that would suggest any kind of a problem with his back between December 2007 and the date of this accident --

A. 5-12 of '08.

Q. May of 08. Do you have anything that would suggest that his condition had deteriorated between December of 2007 and '08 when he has this injury?

A. No, I don't.<sup>5</sup>

Dr. Flutter examined claimant again on November 10, 2010, and assigned claimant the following permanent impairments for his lower extremities:

- 7% to the right lower extremity for mild ankle range of motion deficits which computes to a 3% whole body permanent partial impairment;
- 2% to the left lower extremity for ankylosis of the second toe in full extension which computes to a 1% whole body permanent partial impairment;
- 17% to the left lower extremity for ankle fusion/ankylosis in ten degrees of plantar flexion which computes to a 7% whole body permanent partial impairment;
- 10% to the left lower extremity for mild knee range of motion deficits which computes to a 4% whole body permanent partial impairment;
- 5% to the left lower extremity for mild thigh muscle atrophy which computes to a 2% whole body permanent partial impairment;
- 8% to the left lower extremity for moderate calf muscle atrophy which computes to a 3% whole body permanent partial impairment;
- 7% to the left lower extremity for chronic trochanteric bursitis which computes to a 3% whole body permanent partial impairment.

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<sup>5</sup> Barrett Depo. at 18-19.

Using Table 75 of the *Guides*, Dr. Flutter indicated claimant had a whole body permanent partial impairment of at least 8% to the lumbar spine. Taking into consideration Table 72, Dr. Flutter felt claimant's impairment fell between DRE Lumbosacral Spine Impairment Categories II and III. He opined claimant's impairment was best represented by DRE Category III and, therefore, had a 10% whole body permanent partial impairment. Using the Combined Values Chart, it was Dr. Flutter's opinion claimant had a 30% permanent partial impairment to the whole body.

Dr. Flutter opined the permanent impairment he assigned claimant for the lumbar spine was for the injuries that claimant sustained on May 12, 2008. Respondent's counsel questioned Dr. Flutter at length about whether claimant had a permanent lumbar impairment that preexisted the accident on May 12, 2008. Dr. Flutter was aware that MRIs following claimant's 2006 and 2007 accidents disclosed claimant had herniated discs and in 2007 claimant had radiculopathy. Dr. Flutter testified that according to Dr. Estivo, claimant had a zero percent permanent impairment from his prior back problems. It was Dr. Flutter's opinion that claimant's August 2010 MRI showed an extrusion type of disc herniation which was not present on his 2007 MRI. Dr. Flutter testified that claimant could have been in DRE Category II in 2007, but that would be speculation.

At the request of respondent, claimant was examined on May 31, 2011, by neurosurgical consultant Dr. Paul S. Stein. His report reflects that claimant began having back pain in January 2009, which claimant attributed to an altered gait. Dr. Stein quoted claimant as stating, "The more I was able to get on my feet and walk, my back started hurting from my altered gait. The more I'm on my feet, the more I limp, and my ankles and my back hurt."<sup>6</sup> He opined claimant had the following permanent impairments for the lower extremities:

- 7% to the right lower extremity at the level of the ankle (lower leg) which computes to a 3% whole body permanent partial impairment;
- 17% to the left lower extremity for fusion in mild plantar flexion which computes to a 7% whole body permanent partial impairment;
- 1% to the left lower extremity for the second toe which computes to a 0% whole body permanent partial impairment;
- 8% to the left lower extremity for thigh atrophy which computes to a 3% whole body permanent partial impairment;
- 5% to the left lower extremity for calf atrophy which computes to a 1% whole body permanent partial impairment.

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<sup>6</sup> Stein Depo., Ex. 2 at 2.

Dr. Stein testified claimant had a 5% impairment of the body as a whole for his low back under DRE Lumbosacral Category II. However, he opined that within a reasonable degree of medical probability, claimant's 5% low back impairment preexisted claimant's injury on May 12, 2008. Consequently, Dr. Stein felt claimant had no new permanent impairment as a result of the accident on May 12, 2008.

Dr. Stein was aware of claimant's prior back problems and that after claimant's 2006 and 2007 back injuries Dr. Estivo had assigned claimant a zero percent permanent impairment. Dr. Stein acknowledged claimant was asymptomatic and had no restrictions prior to May 12, 2008. He also confirmed that an altered gait can aggravate, intensify or accelerate a preexisting herniated disc. Dr. Stein explained his rating of claimant's lumbar spine as follows:

Mr. Roberts' current status was diagnosis related category II which is five percent. His pre-existing status would have been category II which is five percent. The guides *[sic]* provide additional impairment for new injury only if it raises you up into a different category, which was not the case. So there would be zero percent impairment specifically in relation to this injury.<sup>7</sup>

ALJ Barnes found that the opinions of Drs. Fluter and Stein concerning claimant's lower extremity impairments were credible and disregarded the opinions of Dr. Pollock. The ALJ averaged the permanent impairments of Drs. Fluter and Stein and found claimant had a 7% functional impairment to his right lower leg and a 34% functional impairment to his left leg. ALJ Barnes recognized that following claimant's 2006 and 2007 low back injuries, Dr. Estivo assigned claimant no restrictions, found claimant was asymptomatic and gave claimant a zero percent permanent impairment. The ALJ stated in her Award, "The Court is persuaded by Dr. Estivo's opinion, the Claimant's testimony and Dr. Fluter's opinion and concludes that Claimant sustained a 7.5 per cent functional impairment rating to the body as a whole relative to the low back."<sup>8</sup> It appears ALJ Barnes averaged the 5% permanent impairment assigned by Drs. Barrett and Stein with the 10% permanent impairment opinion rendered by Dr. Fluter.

#### **PRINCIPLES OF LAW**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>9</sup> "Burden of proof" means the burden of a party to persuade the trier of

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<sup>7</sup> *Id.*, at 9-10.

<sup>8</sup> ALJ Award (Jan. 13, 2012) at 5.

<sup>9</sup> K.S.A. 2007 Supp. 44-501(a).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>10</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>11</sup>

### ANALYSIS

The parties stipulated claimant had a 7% permanent impairment to the right lower leg. The opinions of Drs. Stein and Flutter regarding the permanent impairments they assigned to claimant's left lower extremity are credible. Both physicians relied on the *Guides*, but came to different conclusions on the extent of claimant's permanent impairments. Therefore, the Board affirms the findings of the ALJ that claimant sustained a 7% permanent impairment to the right lower leg and a 34% permanent impairment to the left leg.

The Board also affirms the ALJ's finding that claimant sustained a 7.5% permanent impairment to his low back. Following claimant's 2006 and 2007 accidents, Dr. Estivo, authorized by respondent to treat claimant, opined claimant was asymptomatic, had no permanent impairment and had no permanent restrictions. Both parties accepted and relied upon Dr. Estivo's opinions. Now, after claimant's 2008 accident, respondent asserts claimant did indeed have a preexisting 5% permanent impairment. This argument is, at best, disingenuous.

Drs. Stein and Barrett opined claimant had a 5% preexisting impairment and did not sustain any additional permanent impairment as a result of his May 12, 2008, accident or an altered gait following the accident. However, both physicians acknowledged claimant had a zero percent permanent impairment and was asymptomatic following his 2006 and 2007 accidents. Dr. Barrett testified that following claimant's 2007 accident, because he was asymptomatic and there were no positive findings on examination, according to the *Guides*, claimant had a zero percent permanent impairment. Accordingly, the Board, like the ALJ, averages the 5% permanent impairment assigned to claimant's low back by Drs. Barrett and Stein with the 10% permanent impairment of Dr. Flutter for a 7.5% permanent impairment.

The Board does find that the impairment ratings found by the ALJ to claimant's back, left lower extremity and right lower extremity should be combined into a single whole

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<sup>10</sup> K.S.A. 2007 Supp. 44-508(g).

<sup>11</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).



body impairment. In *Goodell*,<sup>12</sup> the Kansas Court of Appeals ruled that if an injury is both to a scheduled member and to a non-scheduled portion of the body, compensation should be awarded under K.S.A. 44-510e. To put it another way, where a claimant sustains permanent scheduled and non-scheduled impairments, those impairments should be combined into a single whole body impairment.

Consequently, the Board finds claimant has a 7.5% permanent impairment to the back, a 3% permanent impairment to the body as a whole for the right lower extremity and a 14% permanent impairment to the body as a whole for the left lower extremity. Using the *Guides'* Combined Values Chart, the foregoing impairments combine for a 23% whole body permanent impairment.

### **CONCLUSION**

Claimant proved by a preponderance of the evidence that he sustained a 7% permanent impairment to the right lower leg, a 34% permanent impairment to the left leg, and a 7.5% permanent impairment to the body as a whole for his low back, which combine for a whole body impairment of 23%.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>13</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the January 13, 2012, Award entered by ALJ Barnes as follows:

Paul W. Roberts is granted compensation from USD 259 for a May 12, 2008, accident and resulting disability. Mr. Roberts is entitled to receive 24.72 weeks of temporary total disability benefits at \$510.00 per week,<sup>14</sup> or \$12,607.20, plus 93.21 weeks of permanent partial general disability benefits at \$510.00 per week, or \$47,537.10, for a 23% permanent partial general disability, making a total award of \$60,144.30, which is all due and owing less any amounts previously paid.

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<sup>12</sup> *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009).

<sup>13</sup> K.S.A. 2011 Supp. 44-555c(k).

<sup>14</sup> The parties stipulated and the ALJ found claimant received 24.72 weeks of temporary total disability benefits and that claimant's average weekly wage was sufficient to qualify him for the maximum benefit rate of \$510.00 per week. It appears that in calculating the award, the ALJ erroneously used a benefit rate of \$340.02 per week.

The remainder of the Award, which is not inconsistent with the foregoing, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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